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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BENNING A. RICHARDSON et al., Plaintiffs and Appellants, v. BARBARA MATIN et al., Defendants and Respondents.	A132259 (San Francisco County Super. Ct. No. CGC-10-500510)

Benning and Christopher Richardson (Richardsons) appeal from orders granting the motions of defendants, Barbara Matin (Matin) and Wendell McArthur (McArthur), to quash service of summons for lack of personal jurisdiction. The Richardsons assert three grounds for reversal. They argue that Matin and McArthur had the necessary minimum contacts to warrant personal jurisdiction over them in California; that the trial court's consideration of the motions to quash was beyond its authority because a motion to transfer was also pending; and that Matin and McArthur waived their personal jurisdiction defense through other actions taken in the proceedings. We conclude that the trial court properly found no constitutionally sufficient basis for California to exercise jurisdiction over either Matin or McArthur. Thus, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In June 2010, the Richardsons filed a complaint in San Francisco Superior Court alleging, among other causes of action, conversion, conspiracy, receipt of stolen property, breach of fiduciary duty, and constructive fraud against eleven defendants including:

Bank of New York Mellon Corporation; BNY Mellon Shareowner Services; Rabobank; VIB Corporation; Ronald Blok; Andrew, Morris & Buttery, PLC; Kevin Morris; Barbara Matin; Marlene Weeks; Wendell McArthur; and William Vetter, Jr. This appeal involves only Matin and McArthur.

The Richardsons, residents of San Luis Obispo County, own shares of stock in Mid-State Bancshares. This case arises out of prior litigation when a preliminary injunction was entered by the Superior Court of San Luis Obispo County preventing the Richardsons from selling, transferring, or otherwise dealing with stock or other securities in Mid-State Bancshares. In May 2007, Christopher Richardson received a letter from Mellon Investor Services (MIS), a transfer agent, concerning redemption of the Mid-State Bancshares stocks following its acquisition by VIB Corporation. After telephone discussions with unknown employees at MIS concerning a hold on his account due to the earlier preliminary injunction, Christopher issued a written request to remove the hold so he could redeem his securities. In June 2007, Christopher followed up his written request with a phone call to MIS inquiring about the status of his disbursement. He was told by shareholder representative Wendell McArthur that the prior court order prevented MIS from redeeming the securities, and that a check would not be issued without court authorization. McArthur followed up his response to Christopher's telephone inquiry with a letter explaining that a court order prevented release or redemption of the Mid-State shares.

Wendell McArthur does not live in California, has never traveled to California, has no business interest in California, and does not own any property in California. He works for MIS in New Jersey. As part of his job duties as a shareholder representative, he responds to written and telephone inquiries from shareholders throughout the world. McArthur is not authorized to decide whether to approve or deny a shareholder's redemption request. His only function is to communicate decisions made by others at MIS to shareholders. Other than receiving a salary from MIS, McArthur received no

benefit from his communication with Christopher Richardson in June 2007. McArthur had no personal knowledge of the prior litigation that led to the earlier court order.

Barbara Matin has never had any involvement or contact with either Benning or Christopher Richardson. Matin does not live in California, has no business interest in California, and does not own any property in California. From June 2000 until May 2004 she was employed by MIS as a paralegal. Part of her job duties included dealing with stock transfers subject to restrictions and blocking orders. She had no authority to settle any lawsuits brought against MIS. In August 2003, MIS's outside counsel, Kevin Morris, requested any court orders regarding the Mid-State Bancshares stock at issue in the prior case be sent to Matin. In May 2004, Matin left MIS, and ever since has had no responsibility for transfers of stock subject to restriction.

On October 15, 2010, in response to the Richardsons' complaint, Matin and McArthur both moved to quash service of summons for lack of personal jurisdiction. Simultaneously all other defendants, but not Matin and McArthur, moved to transfer venue to San Luis Obispo County. The following week, on October 21, a case management statement was filed jointly on behalf of Bank of New York Mellon Corporation, BNY Mellon Shareowner Services, Rabobank, VIB Corporation, Ronald Blok, Marlene Weeks, and respondents Matin and McArthur. The case management statement notes that Matin and McArthur filed motions to quash service of summons, and the other defendants filed motions for transfer of venue. The defendants requested another case management conference be set after 90 days to allow for responsive pleadings following rulings on the pending motions.

In response to Matin's and McArthur's motions to quash, the Richardsons asserted that each defendant's acts caused effects in California, which were significant enough to give rise to personal jurisdiction. Despite the timely filing of their memoranda of points and authorities, the Richardsons did not appear for the hearing and the court adopted its tentative ruling granting the motions to quash.

The Richardsons timely appeal from the orders quashing service of process upon Matin and McArthur for lack of personal jurisdiction.

DISCUSSION

When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of proving, by a preponderance of the evidence, facts warranting the court's exercise of jurisdiction. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (*Vons*).) If the plaintiff meets this burden, the burden shifts to the defendant to demonstrate that the exercise of jurisdiction would be unreasonable. (*Ibid*.) When evidence is conflicting, we will not set aside the trial court's factual determinations so long as they are supported by substantial evidence. (*Ibid*.) When there is no conflict in the evidence, however, the question of jurisdiction is purely one of law and we engage in an independent review of the record. (*Ibid*.)

It is well settled that "the state has a legitimate interest as sovereign in providing its residents with protection from injuries caused by nonresidents and with a forum in which to seek redress." (*Vons, supra*, 14 Cal.4th at 473.) Accordingly, "California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. (Code Civ. Proc., § 410.10.[1]) A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the [forum] state that the assertion of jurisdiction does not violate ' "traditional notions of fair play and substantial justice." ' (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316; . . . see also *Burnham v. Superior Court* (1990) 495 U.S. 604, 618-19.)" (*Vons, supra*, 14 Cal.4th at pp. 444-45.) Under this "minimum contacts" standard, it is essential that the nature and quality of the

[1] All subsequent statutory references are to the Code of Civil Procedure.

defendant's activity is such that it would be " ' "reasonable" and "fair" ' " to require him to defend in that State. (*Pavlovich v. Superior* Court (2002) 29 Cal.4th 262, 268 (*Pavlovich*), quoting *Kulko v. California Superior Court* (1978) 436 U.S. 84, 92.)

Courts have identified two methods to establish personal jurisdiction — general and specific jurisdiction. (*Pavlovich, supra,* 29 Cal.App.4th at 268.) In this matter, plaintiffs do not contend that general jurisdiction exists over either defendant. We therefore will only address whether specific jurisdiction exists over Matin and McArthur.

A. Specific Jurisdiction.

In determining whether specific jurisdiction exists, courts look to the relationship among the defendant, the forum, and the litigation. (*Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 414-15; *Pavlovich, supra*, 29 Cal.4th at 269.) "A court may exercise specific jurisdiction over a nonresident defendant only if: (1) ' the defendant has purposefully availed himself or herself of forum benefits' (*Vons, supra,* 14 Cal.4th at 446); (2) 'the "controversy is related to or 'arises out of' [the] defendant's contacts with the forum" ' (*ibid*., quoting *Helicopteros, supra*, 466 U.S. at 414); and (3) ' "the assertion of personal jurisdiction would comport with 'fair play and substantial justice' " ' (*Vons, supra,* 14 Cal.4th at 447, quoting *Burger King Corp. v. Rudzeqicz* (1985) 471 U.S. 462, 472-73.)" (*Pavlovich, supra,* 29 Cal.4th at 269.)

Contacts with the forum state must be assessed individually and should not be judged according to an individual's employer's activities.[2] (*Calder v. Jones* (1984) 465 U.S. 783, 790.) Additionally, it is the quality, not the quantity, of the contacts that is the determinative issue in evaluating purposeful availment. (*McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 223 [upholding jurisdiction over a Texas insurance company that never solicited or did business in California apart from the single policy at issue]; cf.

[2] Nor does California recognize conspiracy allegations as a basis for acquiring personal jurisdiction over a party through a co-conspirator's actions in the state. (*Mansour v. The Superior Court* (1995) 38 Cal.App.4th 1750, 1760.)

Elkman v. National States Ins. Co. (2009) 173 Cal.App.4th 1305, 1321 [declining to exercise jurisdiction where insurance company did not solicit business or purposefully avail itself of the benefits or protections of California through accepting premium payments from insured clients who unilaterally moved to California.) A single contact may qualify as purposeful availment to satisfy part of the specific jurisdiction analysis, but unilateral activity by one party may not expose the other to jurisdiction.

There is simply no basis to conclude that either Matin or MacArthur purposely availed themselves of the benefits of California's laws, that any part of this controversy arises out of their contact with this state, or that it would be fair to require them to answer and defend this action. Each of them is a New Jersey-based employee of a corporate defendant. Neither had any discretionary or policy authority over the transactions identified in the Richardsons' complaint. Matin became involved in the transactions because her job duties required her to receive and implement orders made in the earlier California litigation. MacArthur became involved because he answered a phone call from Christopher Richardson and corresponded with him regarding his request to redeem the Mid-State Bancshares stock.

The Richardsons' allegations that these individual defendants had more significant roles in the events leading up to this lawsuit, or stood to personally gain from the underlying transactions, do not satisfy their burden of proof. While Benning Richardson filed declarations in support of the motions to quash in order to verify the allegations of the complaint, the material allegations regarding Matin's and MacArthur's involvement were made on information and belief. "Even though a verified complaint may serve as an affidavit, statements made on information and belief will not sustain the burden of proof." (*Shearer v. Superior Court* (1977) 70 Cal.App.3d 424, 430.) There are simply no facts from which one could conclude that Matin or McArthur purposefully directed their activities on behalf of Mid-State Bancshares to California residents or that it would

be fair or just to hold them subject to California jurisdiction. (Cf. *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969, 974.)

B. The Trial Court's Authority to Grant the Defendants' Motions.

The Richardsons also claim that the trial court acted beyond its authority when it granted Matin's and McArthur's motions to quash because the timely filing of the motion for change in venue operated to stay any other motion or proceeding pending before that court. Here, the co-defendants not party to this appeal filed a motion for change of venue from San Francisco County to San Luis Obispo County on October 15, 2010. The change of venue motion was filed simultaneously with Matin's and McArthur's motions to quash.

As a general rule, when a notice of motion for change of venue is filed, the trial court should not rule upon any matters that should properly be determined by the trial court that will ultimately decide the case. (*Pfefferle v. Lastreto* (1962) 206 Cal.App.2d 575, 580.) "But this restriction cannot be held to apply to matters incidental to a consideration by the trial court of the motion to change venue. . . . 'The reason for the suspension of such powers of the court is that if a defendant is entitled to have his motion for change of venue granted, he is entitled to have such matters heard before the court of the county of his residence . . . .' " (*Ibid.*) In *Pfefferle*, the court considered a motion to sever multiple plaintiffs incidental to a motion for a change of venue. (*Id*. at 580-81.) The appellate court upheld the ruling on the motion to sever, because the decision on severance was ancillary to considerations of proper venue. (*Ibid*.)

So, too, here. The motions to quash were incidental and separate from the issues presented by the venue motion and the merits of the Richardsons' complaint. Moreover, the rationale for suspending a court's power to act in favor of determining matters in the defendant's county of residence does not apply to the circumstances in this case because no California court would have personal jurisdiction over Matin and McArthur. (*City of*

Oakland v. Darbee (1951) 102 Cal.App.2d 493, 503.) The trial court did not act in excess of its jurisdiction when it decided Matin's and McArthur's motions to quash.

C. Waiver of Personal Jurisdiction.

The Richardsons assert that Matin and McArthur waived their ability to challenge personal jurisdiction through various acts including: participating in and filing case management statements; setting the hearing on motion to quash service of summons beyond the 30-day period specified in section 418.10, subdivision (b); and acknowledging receipt of service of process. There is no indication that the Richardsons raised any of the waiver issues to the trial court.[3] " 'It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal.' (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488.)" (*Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249.) Thus, we conclude that the Richardsons forfeited their ability to argue there was a waiver of the lack of in personam jurisdiction.

Moreover, neither scheduling a hearing date beyond the 30-day period articulated under section 418.10, subsection (b) nor acknowledging receipt of service of summons represents a defendant's waiver of objections to personal jurisdiction. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1296; *In re Marriage of Merideth* (1982) 129 Cal.App.3d 356, 361.) Additionally, once a defendant's motion to quash for lack of jurisdiction is timely filed, no act by the defendant constitutes an appearance, unless the

[3] The record on appeal reflects that the Richardsons did not appear at the hearing on the defendant motions to quash. The Richardsons are responsible for providing an adequate record demonstrating error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.)

court denies the motion. (§ 418.10, subd. (e) (1).)[4] We are aware of no authority that suggests the court must consider a challenge to personal jurisdiction waived for the reasons presented by the Richardsons.

DISPOSITION

The orders granting defendants' motions to quash are affirmed.

_____
Siggins, J.

We concur:

_____
McGuiness, P.J.

_____
Jenkins, J.

[4] Section 418.10, subsection (e) was added by the legislature in 2002 to "streamline the process, reduce confusion, and avoid traps for the unwary [by reducing the risk of inadvertent waiver of jurisdiction through delayed recognition of a party's general appearance until after the motion to quash is resolved]." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1325 (2001-2002 Reg. Sess.) April 2, 2002, p. 5.)